IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPEALLATE JURISDICTION

SECOND APPEAL NO.30 OF 2005

AND

SECOND APPEAL NO.31 OF 2005

Shri Ashok Ambadas Gangane ... Appellant.

Versus

M/s. Shubhamangal Builders & Others ... Respondents.

SECOND APPEAL NO.31 OF 2005

Shri Ashok Ambadas Gangane ... Appellant.

Versus

Pune Municipal Corporation & Others ... Respondents.

Mr. V.P. Sawant for the Appellant.
Mr. R.V. Govilkar for Respondent No.1.
Mr. R.G. Ketkar for Respondent Nos.2 & 3.

CORAM: A.S.OKA,J.

DATE : 1ST APRIL 2005.

ORAL JUDGMENT :-

1. Following substantial questions of law arise :-

(i) Whether the notice issued under Section 478 of the

Bombay Provincial Municipal Corporations Act, 1949 is valid as the repairing work allegedly carried out by the Appellant is not covered by Section 478 of the said Act of 1949 ?

(ii) Whether the Respondent No.2 - Corporation ought to have issued notice under Section 260 of the said Act of 1949 ?

(iii) Whether the action of the Respondent No.2 - Corporation is in controvention of principles of natural justice ?

(iv) Whether the Judgment of the Appellate Court is perverse in as much as there is no clear finding recorded by the Appellate Court as regards the nature and extent of alleged unauthorised construction carried out by the Appellant ?

2. The Second Appeals are admitted on the aforesaid substantial questions of law. Shri Govilkar waives service for the Respondent No.1 and Shri Ketkar waives service for the Respondent Nos.2 and 3. Considering the facts and circumstances of the case Second Appeals are

taken up for hearing forthwith.

3. These Second Appeals arise out of Judgment and Decree passed in the same suit and therefore, the Appeals are being disposed of by a common Judgment.

4. For the sake of convenience the Parties are referred to with reference to their status in Second Appeal No.30 of 2005. The Appellant is the original Plaintiff and the Respondents are the Defendants. With a view to appreciate the submissions made by the Counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief. The dispute in the suit about a plot of land having area of 20’ x 25’ together with the structure standing thereon out of land bearing C.T.S.No.380, Narayan Peth, Pune. (The structure on the said area of 20’ x 25’ is hereinafter refferred to as the suit structure.) The case of the Appellant is that his father was inducted as a tenant in the suit structure by the original Landlord. It is stated in the Plaint that the Landlord has now conveyed the entire property in favour of the Respondent No.1 by executing a conveyance dated 21st June 1993. The case of the Appellant is that the suit structure is used as a

residential house and there is a stall for selling sugarcane juice in the suit structure. According to the Appellant, the suit structure had become dangerous and it needed urgent repairs. It is stated that the wooden beams on which roof of the suit structure was rested were required to be replaced as the same were affected by white ants and pests.

5. The Appellant made an application dated 21st December 1995 to the Respondent No.2 - Corporation for seeking permission to carry out repairs. The Respondent No.2 granted permission to carry out repairs by letter dated 16th November 1996. In the said permission it was stated that the permission was granted subject to condition that the Appellant will leave 5’ wide space for road widening and 7.6’ wide space for set back. On 7th February 1997, the Appellant submitted an application to the Respondent No.2 - Corporation seeking modification of the permission granted earlier. As no reply was received to the said application, the Appellant carried out the work of repairs as per the permission granted to him by keeping open the area admeasuring 20’ x 5’. The Respondent No.2 - Corporation served notice dated 13th February 1997 under Section

478(1) of the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as the said Act of 1949). In the said notice, it was alleged that the Appellant had carried out un-authorized work of construction and he was called upon to remove iron girders and structure of permanent nature within a period of 30 days from the receipt of the notice. The suit was filed by the Appellant for challenging the said notice.

6. The suit was contested by the Respondents. The Respondent Nos.2 and 3 filed written statement and raised various contentions including the contention regarding maintainability of suit for want of service of statutory notice under Section 487 of the said Act of 1949. A case is made out that in breach of the conditions imposed while granting repairing permission, the Appellant has made a new construction on the site by using steel girders, bricks and cement without obtaining permission of the Respondent No.2 - Corporation. The Respondent No.1 also filed a separate written statement and contended that the suit property admeasuring 20’ x 20’ was let out to the father of the Appellant by the predecessor of the Respondent No.1. The Respondent No.1

also alleged that work is carried out by the Appellant in violation of the permission be granted in favour of the Appellant.

7. The learned Trial Judge decreed the suit by holding that impugned notice was illegal and granted perpetual injunction against the Respondent restraining the Respondent from demolishing the suit structure. There were two separate Appeals preferred against the decree of the Trial Court by the Respondent No.1 and Respondent Nos.2 and 3 respectively. The Appeals were disposed of on the same day by separate Judgments. The Appeals were allowed and the Judgment and the Decree of the Trial Court was quashed and set aside.

8. The learned Counsel appearing for the Appellant has filed a compiliation of relevant documents of record of the Trial Court. The learned Counsel submitted that looking to the nature of allegations made in the notice under Section 478(1) of the said Act 1949, action of demolition could not have been taken by invoking the provisions of Section 478(1) of the said Act of 1949 and in fact the action could have been taken only under the

Provision of Section 260 of the said Act of 1949. He submitted that the principles of natural justice are not followed. He invited my attention to the findings recorded by the Trial Court as well as by the Appellate Court. He submitted that there is no clear finding recorded by the Appellate Court as regards the nature and the extent of alleged un-authorised construction carried out by the Appellant. It is submitted that all that was done by the Appellant was replacement of tin sheets of the roof. It is submitted that the area of the suit structure is not extended. He pointed out that the learned Trial Judge has recorded a finding of the fact that the repair work is carried out as per the repair permission and no reasons are assigned by the Appellate Court while setting aside the said finding.

9. Shri Ketkar is appearing for Respondent Nos.2 and 3 contended that as the Appellant carried out work contrary to the repair permission granted in his favour, Section 478(1) of the said Act 1949 was squarely applicable and there was no necessity of issuing notice under Section 260 of the said Act 1949. It is submitted that the impugned notice also gives 30 days time to the Appellant. It is submitted that there is a clear

finding recorded by the Appellate Court that unauthorised work was carried out by the Appellant. He submitted that in view of the findings recorded by the Appellate Court, no interferance was necessary.

10. Shri Govilkar is appearing for Respondent No.1 has placed reliance on photographs. He has also invited my attention to the findings recorded by the Court below. He has also supported the impugned Judgment and Decree of the Appellate Court.

11. The permission dated 16th November 1996 granted by the Respondent No.2 in favour of the Appellant recorded that permission was granted to the Appellant to replace the tin sheets on the Suit structure subject to condition of leaving area for set back and the area reserved for road widening (5 feet for road widening and 7.5 feet for set back) open. At Exbhibit 63, the report of the Building Inspector of the Respondent No.2 is produced which records that the Appellant is carrying out work by using iron girders and bricks. It is pertinent to note that in the report of the Inspector it is not stated that the Appellant is carrying out work on the set back area or on the land reserved for road

widening. The letter dated 11th February 1997 sent by the Assistant Engineer of the Respondent No.2 addressed to the Appellant merely records that the Appellant should not carry out the work contrary to the repair permission and of permanent nature. The impugned notice dated 13th February 1997 records that contrary to the repair permission, the Appellant has carried out the work of permanent nature by using bricks and iron girder and the Appellant was called upon to remove the work of permanent nature. Even in the said notice, there is no allegation that the Appellant has made the construction on the set back area or on the area reserved for road widening.

12. The learned Trial Judge has recorded a findings that the work carried out by the Appellant is in accordance with the repair permission. It is, therefore, necessary to see the findings recorded by the Appellate Court. In paragraph No.8 of its Judgment which is the first paragraph in the reasons recorded in the Judgment, the Appellate Court has observed that in the plaint, the Appellant has stated that dimention of the suit structure as 20’x 20’. However, in the

evidence the Appellant admitted that he was occupying area of 20’x 25’. The Appellate Court therefore held that the Appellant is not entitled to injunction as regards area of 5 feet x 20 feet. Paragraph No.9 of the Judgment of the Appellate Court refers to conditions imposed by the Respondent No.2 - Corporation in permission dated 16th November 1996. Paragraph No.10 and 11 of the Judgment refer to provisions of the said Act 1949 and certain decisions of this Court and the Apex Court. Paragraph No.12 of the Judgment refers to application for regularization made by the Appellant dated 26th February 1997. Paragraph No.13 of the Appellat Court Judgment reads thus :-

> " Taking into consideration overall facts and the circumstances of the case, as also the material on record and the case law envisaged supra, it is manifest that the respondent No.1 - Plaintiff violated the terms of permission to effect repairs of the disputed structure. So, he is not entitled to the reliefs of declaration with respect to the notice dated 13.02.1997 and injunction restraining the defendants - Corporation from acting under that notice. I, therefore, record my findings on points Nos.1 and 2 accordingly as above."

This is the only finding of fact recorded by the Appellate Court.

13. In the last paragraph of the Judgment i.e. Paragraph No.14 the learned Appellate Court has held that the learned Judge has misread the entire evidence and the Provisions of Law.

14. The Trial Court has framed Issue No.1 which reads thus :-

> " Does plaintiff prove that construction carried of suit premises, as per permission granted by Defendant Corporation ? "

15. The Appellate Court has raised point no.1 for determination as under :-

> " Whether the Respondent No.1 has violated the terms of permission to effect repairs accorded by defendants - Corporation ? "

16. Thus, the main factual controvercy which was to be decided before the Appellate Court was whether the Appellant has carried out any work of construction in violation of repair permission dated 16th November 1996. As pointed out earlier, the said factual controvercy is not at all decided by the Appellate Court. The said factual controvercy was required to be decided in view of the allegations made by the Respondent No.2 - Corporation in notice issued under Section 478 (1) of the said Act 1949. It can not be disputed that the

First Appellate Court is the final Court of facts. If the final Court of facts has not exercised its jurisdiction according to law that itself raises a substantial question of law. As held by the Apex Court, if procedure followed by the Appellate Court is contrary to the Provisions of Code of Civil Procedure, 1908 a substantial question of law arises. As the Appellate Court has not recorded a clear findings on Issue No.1 as framed by the Trial Court and on point for for determination No.1 as framed in the impugned Judgment and Order, the other issues based on legal contentions of the parties could not have been decided. The factual controvercy as reflected in Issue No.1 of the Trial Court was not decided by the Appellate Court after consideration of the oral and documentary evidence led by the parties. In my view on this ground alone, the Judgment of Appellate Court deserves to be set aside and the Appeals deserves to be sent back to the Appellate Court for hearing the same afresh.

17. Hence, I pass the following order :-

(i) The impugned Judgments and Decrees dated 30th November 2001 are quashed and set aside.

(ii) Civil Appeal Nos.56 of 2002 and 296 of 2004 are restored to file.

(iii) The parties are directed to appear before the learned 8th Additional District Judge, Pune on 13th June 2005 for fixing the date of hearing.

(iv) The Appellate Court will decide the Appeals afresh in the light of observations made by this Court in this Judgment as expeditiously as possible preferrably on or before 31st October 2005. Till the disposal of the Appeals, the Parties will maintain status quo in all respects in respect of the suit structure.

(iv) Parties and the concerned Court to act upon the authenticated copy of the Judgment.

(A.S. OKA, J.)